

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JESSICA GESSELE, ASHLEY
GESSELE, NICOLE GESSELE,
TRICIA TETRAULT, and
CHRISTINA LUCHAU, on behalf
of themselves and all others
similarly situated,

3:10-CV-00960-BR

OPINION AND ORDER

Plaintiffs,

v.

JACK IN THE BOX, INC., a
Corporation of Delaware,

Defendant.

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BROWN, Judge.

This matter comes before the Court on Defendant's Bill of Costs (#299) and Plaintiffs' Bill of Costs (#302). For the reasons that follow, the Court **DENIES** Defendant's and Plaintiffs' Cost Bills.

BACKGROUND

On August 13, 2010, Plaintiffs Jessica Gessele, Ashley Gessele, Nicole Gessele, and Tricia Tetrault on behalf of all those similarly situated filed a putative class-action Complaint in this Court against Defendant Jack in the Box, Inc., for violation of the minimum-wage and overtime provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, *et seq.*, and various Oregon wage-and-hour laws. Specifically, Plaintiffs alleged Defendant (1) failed to pay minimum wages in violation of the FLSA, (2) failed to pay overtime wages in violation of the FLSA, (3) failed to pay minimum wages in violation of Oregon Revised Statute § 653.025, (4) failed to pay overtime wages in violation of Oregon Revised Statute § 653.261, (5) failed to pay all wages due after termination of Plaintiffs' employment in violation of Oregon Revised Statute § 652.140, (6) deducted unauthorized amounts from Plaintiffs' paychecks in violation of Oregon Revised Statute § 652.610, (7) failed to issue wages in the form required by Oregon Revised Statute § 652.110, and

(8) failed to pay all wages when due as required by Oregon Revised Statute § 652.120.

On December 15, 2010, Defendant moved to dismiss Plaintiffs' First through Fifth Claims. On January 31, 2011, Magistrate Judge Janice M. Stewart issued Findings and Recommendation in which she recommended the Court grant Defendant's Motion to Dismiss.

On April 11, 2011, Senior District Judge Ancer Haggerty issued an Order adopting the Findings and Recommendation, granting Defendant's Motion to Dismiss, and granting Plaintiffs leave to file an Amended Complaint.

On May 16, 2011, Plaintiffs filed a First Amended Complaint in which they asserted the same claims as in their initial Complaint but added Christina Luchau as a Plaintiff and included additional facts to support their claims.

On May 31, 2011, Defendant filed an Answer to Plaintiffs' First Amended Complaint in which it asserted, among other things, a statute-of-limitations defense as follows: "Plaintiffs' claims are barred in whole, or in part, by applicable statutes of limitations."

On July 18, 2011, Plaintiffs filed a Motion to Strike Defendant's Affirmative Defenses. In particular, Plaintiffs moved to strike Defendant's statute-of-limitations defense on the ground that Defendant did not "identify which claims are

allegedly subject to this affirmative defense, nor in what way they are supposedly barred. . . . Plaintiffs therefore cannot substantially respond to nor pursue discovery on this issue."

On August 30, 2011, Magistrate Judge Stewart heard oral argument on Plaintiffs' Motion to Strike.

On September 2, 2011, Magistrate Judge Stewart issued an Opinion in which she concluded, among other things, that Defendant's statute-of-limitations defense was "merely a precautionary defense without a sufficient factual basis." Magistrate Judge Stewart, therefore, granted Plaintiffs' Motion to Strike as to Defendant's statute-of-limitations defense "without prejudice to defendant's right to amend its answer."

On December 14, 2011, Magistrate Judge Stewart held a status conference in which she advised the parties that she was going to enter an order tolling the statute of limitations "for absent collective class members" beginning on December 14, 2011, and continuing "until class certification." Hearing Tr. 54-55 (#148). On December 14, 2011, Magistrate Judge Stewart issued an Order (#59) tolling the statute of limitations for "absent putative class members."

On March 20, 2012, Plaintiffs filed a Second Amended Complaint in which Plaintiffs allege Defendant (1) failed to pay minimum wages in violation of the FLSA, (2) failed to pay overtime wages in violation of the FLSA, (3) failed to pay

minimum wages in violation of Oregon Revised Statute § 653.025, (4) failed to pay overtime wages in violation of Oregon Revised Statute § 653.261, (5) failed to pay all wages due after termination of Plaintiffs' employment in violation of Oregon Revised Statute § 652.140, (6) deducted unauthorized amounts from Plaintiffs' paychecks in violation of Oregon Revised Statute § 652.610, and (7) failed to pay all wages when due as required by Oregon Revised Statute § 652.120.

On April 12, 2012, Defendant filed an Answer to Plaintiffs' Second Amended Complaint in which it asserted Affirmative Defenses that again included the statute of limitations. As in Defendant's Answer to Plaintiffs' First Amended Complaint, Defendant alleged only that "Plaintiffs' claims are barred in whole, or in part, by applicable statutes of limitations."

On May 22, 2012, Magistrate Judge Stewart heard oral argument on various Motions pending at that time. At the hearing Plaintiffs made an oral Motion to Dismiss Defendant's Affirmative Defenses. The Magistrate Judge granted Plaintiffs' Motion and dismissed Defendant's statute-of-limitations defense without prejudice and with leave to amend. The Magistrate Judge noted:

I think what is going to happen in this case is at some point, if the defendant decides that it has, for example, a valid statute of limitations defense with a particular class member with respect to a particular claim, they're going to have to seek leave of court to amend and add that affirmative defense with specific factual allegations to go forward.

Hearing Tr. 7 (#185). The Magistrate Judge specifically denied Plaintiffs' request to dismiss with prejudice the statute-of-limitations defense against the named Plaintiffs.

On August 13, 2012, Plaintiffs filed a Motion to Certify Oregon Rule 23(b) (3) Classes and Alternative Motions to Either Certify Hybrid FLSA Classes or Certify FLSA 216(b) Collectives.

On October 22, 2012, Defendant filed a Motion to Amend/Correct Answer in which it requested leave to file an Amended Answer to Plaintiffs' Second Amended Complaint that, among other things, did not include a statute-of-limitations Affirmative Defense.

On December 13, 2012, Plaintiffs filed a Third Motion for Leave to File Amended Complaint.

On December 20, 2012, Magistrate Judge Stewart issued an Order granting Defendant's Motion to Amend/Correct Answer. On December 27, 2012, Defendant filed its Amended Answer to Plaintiffs' Second Amended Complaint. Defendant's Amended Answer did not include a statute-of-limitations Affirmative Defense.

On January 7, 2013, Magistrate Judge Stewart denied Plaintiffs' Third Motion for Leave to File Amended Complaint on the grounds of undue delay and prejudice. Specifically, the Magistrate Judge noted:

Given the amended pleadings, extensive discovery and motion practice to date, including plaintiffs' pending motion for class certification, this case is too far advanced to add two new defendants

(including a representative of a proposed defendant class), many new claims unrelated to the pending claims for wage and hour violations, additional putative class members, and over 50 new proposed classes and subclasses.

Order (#157).

On January 28, 2013, Magistrate Judge Stewart issued Findings and Recommendation in which she recommended granting in part and denying in part Plaintiffs' Motion to Certify and specifically recommended conditional certification of Plaintiffs' proposed FLSA Workers Benefit Fund and Shoe Collectives and Subcollectives under § 216(b) and certification of Plaintiffs' proposed Rule 23(b)(3) Oregon Workers Benefit Fund and Shoe Classes and Subclasses.

On April 1, 2013, Judge Haggerty entered an Order adopting the January 28, 2013, Findings and Recommendation; conditionally certifying Plaintiffs' proposed FLSA Workers' Benefit Fund and Shoe Collectives and Subcollectives under § 216(b); and certifying Plaintiffs' proposed Rule 23(b)(3) Oregon Workers Benefit Fund and Shoe Classes and Subclasses.

On May 7, 2013, Defendant filed a Motion for Leave to Amend Answer in which Defendant sought to include a statute-of-limitations defense. Specifically, Defendant asserted the named Plaintiffs failed to file written consent forms that are a prerequisite to commencing a collective action under §§ 216(b) and 256 of the FLSA and the FLSA's three-year limitation period

expired on March 31, 2013, as to the named Plaintiffs. According to Defendant, this was the first time Defendant had a specific factual basis to support its statute-of-limitations defense.

Also on May 7, 2013, Defendant filed a Motion for Summary Judgment as to all of Plaintiffs' claims on the grounds that Plaintiffs' FLSA claims are barred by the statute of limitations and that this Court may not exercise supplemental jurisdiction over Plaintiffs' state-law claims.

On May 31, 2013, Plaintiffs filed a Response to Defendant's Motion for Leave to Amend Answer in which they objected to Defendant's Motion on numerous grounds.

On June 18, 2013, Magistrate Judge Stewart issued an Opinion and Order in which she granted Defendant's Motion for Leave to Amend Answer. On July 1, 2013, Plaintiffs filed Objections to the Opinion and Order.

On August 27, 2013, this Court issued an Order affirming Magistrate Judge Stewart's Opinion and Order and granted Defendant's Motion for Leave to Amend Answer.

On October 16, 2013, the Court also entered an Order granting Plaintiffs additional time to conduct discovery related to the statute-of-limitations issues before filing a response to Defendant's Motion for Summary Judgment. Because it was not clear to the Court how much additional time Plaintiffs were requesting or what "reasonable parameters the Court should set

for the additional discovery," the Court directed counsel to confer and to submit no later than October 28, 2013, a joint statement setting forth their respective positions regarding the time necessary to complete the additional discovery as well as a proposed schedule to complete the briefing on Defendant's Motion for Summary Judgment.

On October 28, 2013, Defendant filed a Motion for Stay of Certain Proceedings and for a Status Conference instead of filing a joint statement. In its Motion Defendant sought a stay of proceedings as to Plaintiffs' Motions that were filed after Defendant's Motion (#174) for Summary Judgment; i.e., a stay as to Plaintiffs' Motion (#206) to Appoint Class Administrator and to Authorize Dissemination of Notice to Class and Collective Members, Plaintiffs' Motion (#212) for Spoliation Sanctions Re FLSA Shoe Claims and Defenses, and Plaintiffs' Alternative Motion (#214) for Partial Summary Judgment on FLSA Shoe Claims and Defenses.

On November 7, 2013, the Court held a status conference with counsel for the purpose of (1) considering and resolving the amount of time that should be permitted for additional discovery related to Defendant's pending Motion (#174) for Summary Judgment; (2) considering Defendant's Motion (#217) for Stay of Certain proceedings; and (3) managing the resolution of Plaintiffs' Motions ## 206, 212, and 214.

On November 7, 2013, the Court also issued an Order (1) setting January 3, 2014, as the date for Plaintiffs to file their response to Defendant's Motion for Summary Judgment and January 20, 2014, as the date for Defendant to file its Reply; (2) scheduling oral argument on the parties' various motions to be heard on January 30, 2014; and (3) advising the parties that they would not be permitted to file any additional motions without advance leave of Court.

On November 26, 2013, the parties filed a Joint Statement of Stipulated Facts in which they noted:

Jack in the Box asserts that the named Plaintiffs' FLSA statutes of limitations expired on the following dates:

- a. Jessica Gessele: November 23, 2011 (2012 for willful damages claims)
- b. Ashley Gessele: February 8, 2011 (2012 for willful damages claims)
- c. Nicole Gessele: April 1, 2011 (2012 for willful damages claims)
- d. Tricia Tetrault: July 22, 2010 (2011 for willful damages claims)
- e. Christina Luchau: March 31, 2012 (2013 for willful damages claims) [.]

Jack in the Box received letters from Mr. Egan on behalf of Plaintiffs asserting various wage claims and citing state and federal statutes on various dates including on May 3, 2010 for Jessica Gessele and on July 26, 2010 for other plaintiffs.

Jack in the Box's in-house counsel Raymond Pepper and James Stubblefield had at all relevant times the responsible knowledge within Jack in the Box of the reasons for the decision to file the motion for summary judgment at DKT #175, including the potential availability of an FLSA defense based on a lack of filed consents.

Joint Statement (#230) at 1.

On November 27, 2013, the parties advised the Court of a discovery dispute related to defense counsel's knowledge of the availability of the FLSA statute-of-limitations defense. On December 12, 2013, the Court held a hearing on this particular discovery issue and also entered an Order (1) setting December 27, 2013, as the date for Defendant's responses to interrogatories and briefing on any objections to the interrogatories; (2) setting January 6, 2014, as the date for Plaintiffs to file any response; (3) scheduling a further discovery conference on January 10, 2014; (4) extending Plaintiffs' deadline to respond to Defendant's Motion for Summary Judgment (#174) to January 17, 2014, and Defendant's reply to February 3, 2014; and (5) striking oral argument set on January 30, 2014.

On January 6, 2014, Plaintiffs filed a Motion to Compel Discovery and/or Strike Affirmative Defense in which Plaintiffs sought an order compelling production of discovery from Defendant and/or striking Defendant's affirmative defense of waiver on the grounds of Defendant's "(non)responses and its (non)briefing of its objections."

On January 15, 2014, the Court heard oral argument on Plaintiffs' Motion to Compel. On that same day the Court issued an Order denying Plaintiffs' Motion to Compel; setting January 21, 2014, as the date for Plaintiffs to respond to

Defendant's Motion for Summary Judgment (#174) and January 28, 2014, as the date for Defendant to file its reply; and setting oral argument on February 10, 2014, regarding Defendant's Motion.

On February 10, 2014, the Court heard oral argument on Defendant's Motion for Summary Judgment.

On March 19, 2014, the Court issued an Opinion and Order granting Defendant's Motion for Summary Judgment, dismissing with prejudice Plaintiffs' FLSA claims as time-barred and dismissing without prejudice Plaintiffs' state-law claims. On March 20, 2014, the Court entered a Judgment dismissing Plaintiff's FLSA claims with prejudice and dismissing Plaintiffs' state-law claims without prejudice.

On April 16, 2014, Plaintiffs filed a Motion to Amend or Correct the Court's February 19, 2014, Opinion and Order.

On May 15, 2014, the Court entered an Order in which it granted Plaintiffs' Motion to Amend. Also on May 15, 2014, the Court issued an Amended Opinion and Order in which it granted Defendant's Motion for Summary Judgment on the ground that this Court did not acquire jurisdiction over Plaintiffs' federal claims (because they were time-barred) and dismissed Plaintiffs' claims without prejudice. Finally on May 15, 2014, the Court entered an Amended Judgment dismissing all of Plaintiffs' claims without prejudice.

On May 23, 2014, Defendant filed a Bill of Costs. On

May 29, 2014, Plaintiffs filed a Bill of Costs.

On June 5, 2014, Plaintiffs filed an action in Multnomah County Circuit Court against Defendant asserting the same state and federal claims that Plaintiffs asserted in their Second Amended Complaint in this action.¹

On June 30, 2014, the Court took the parties' Cost Bills in this matter under advisement.

DISCUSSION

Plaintiffs and Defendant each seek costs pursuant to 28 U.S.C. § 1919, which provides: "Whenever an action or suit is dismissed in any district court . . . for want of jurisdiction, such court may order the payment of just costs." The Ninth Circuit has held § 1919 rather than Federal Rule of Civil Procedure 54(d) governs an award of costs when the underlying claim has been dismissed for lack of jurisdiction. *Miles v. State of Ca.*, 320 F.3d 986, 988 (9th Cir. 2003). "Unlike Rule 54(d), § 1919 is permissive, allows the district court to award 'just costs,' and does not turn on which party is the 'prevailing party.'" *Id.* at 988 n.2.

¹ On July 9, 2014, Defendant removed the newly-filed state case from Multnomah County Circuit Court to this Court, and that removed matter is pending as Case No. 14-CV-1092-BR. On August 8, 2014, Plaintiffs filed an Amended Motion to Remand (that) Case to State Court, and that Motion remains pending the parties' briefing and the Court's consideration of its merits.

As noted, both parties in this matter assert the Court should exercise its discretion and award them their costs. When a matter is dismissed for lack of jurisdiction, however, courts that have exercised their discretion to award costs typically have awarded costs to the defendant. Plaintiffs cite two cases in which courts in this district have awarded costs to the plaintiff when a matter has been dismissed for lack of jurisdiction. Those cases, however, are distinguishable. In *Humbarger v. Mortgage Electronic Registration Systems, Inc.*, the plaintiff filed an action to stop the nonjudicial foreclosure of his home. After the plaintiff filed his complaint, the defendant elected to rescind the nonjudicial foreclosure proceedings and to pursue "other alternatives." No. 3:11-cv-1202-PA, 2012 WL 6649370, at *3 (D. Or. Dec. 19, 2012). Based on that particular set of circumstances, the court concluded the plaintiff was entitled to his "just costs" under § 1919. *Id.* Similarly, in *Murphy v. First Horizon Home Loan* the plaintiffs filed an action seeking relief from a nonjudicial foreclosure that had resulted in the sale of their home. The defendant voluntarily rescinded the foreclosure sale. The court, relying on *Humbarger*, awarded the plaintiffs their costs under § 1919 and noted the plaintiffs "correctly identified a serious deficiency in the nonjudicial foreclosure process that resulted in the sale of their home That Defendants chose to [rescind the foreclosure sale]

should not force the [plaintiffs] to bear the costs of bringing this action." No. 3:12-cv-000818-SI, 2013 WL 1295575, at *6 (D. Or. Mar. 26, 2013).

The Court notes that throughout the extensive litigation history of Case No. 3:10-cv-00960-BR, both Plaintiffs and Defendant have won and lost various arguments related to numerous issues including the question of pleading Defendant's statute-of-limitations defense, class certification, jurisdiction, and federal jurisdiction. The *Humbarger* and *Murphy* courts' analysis and conclusions, therefore, are not particularly enlightening.

According to Plaintiffs, an award of costs to Defendant is premature because Plaintiffs have filed a second action asserting the same claims against the same Defendant in the presently removed state case and the costs incurred by Defendant are for depositions and transcripts that will be equally useful to litigation of the state-court action. Plaintiffs' assertion, however, cuts both ways. The costs incurred by Plaintiffs also are for transcripts that are likely to be helpful to Plaintiffs in the state-court litigation.

Because Plaintiffs filed the second action in state court with the same claims and same parties as in this matter, Defendant has removed that action to this Court, and Plaintiffs seek to have that matter remanded, it is clear that litigation between these parties involving these claims is likely to

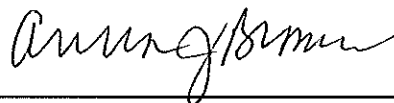
continue for some time. Although the Ninth Circuit has held the Court is not required to defer an award of costs under § 1919 when a parallel state case is proceeding (*see Otay Land Co. v. United Enterprises, Inc.*, 672 F.3d 1152, 1160 (9th Cir. 2012)), this Court concludes in the circumstances of this case that it would be fair, efficient, and effective to delay any award of costs to the parties involved in these matters until the last related matter is fully concluded. Accordingly, in the exercise of its discretion the Court declines to award costs to either party at this time.

CONCLUSION

For these reasons, the Court **DENIES** Defendant's Bill of Costs (#299) and **DENIES** Plaintiffs' Bill of Costs (#302).

IT IS SO ORDERED.

DATED this 13th day of August, 2014.



ANNA J. BROWN
United States District Judge